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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT OCHOA,

Defendant and Appellant.

A145781

(Contra Costa County  
Super. Ct. No. 51420116)

Defendant Vincent Ochoa appeals a judgment convicting him of first degree murder with related gang enhancements and sentencing him to 60 years to life in prison. He contends that his first degree murder conviction and gang enhancement must be reversed because the prosecution's gang expert based his opinions on inadmissible testimonial hearsay in violation of his right to confrontation under the Sixth Amendment. After defendant's appeal was fully briefed, the California Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which significantly impacted the issues on appeal. At this court's request, the parties submitted supplemental briefing addressing *Sanchez*. Having reviewed the parties supplemental briefs, we find no prejudicial error and therefore shall affirm the judgment, except that we shall strike the 10-year sentence enhancement that the parties agree was improper.

## **Factual and Procedural History**

On September 16, 2014, defendant was charged with the murder of Ismael Ramirez (Pen. Code,<sup>1</sup> § 187, subd. (a)), with enhancement allegations that defendant personally discharged a firearm causing death (§ 12022.53, subd. (d)) and that the murder was committed for the benefit of a gang (§ 186.22, subd. (b)(1)).

The following evidence was presented at trial:

On April 6, 2013, Ramirez and defendant attended the same party. A guest at the party testified that sometime before 8:00 p.m. a disagreement broke out among the guests during which Ramirez took off his shirt and chanted loudly: “San Francisco, it’s all about San Francisco.”

Defendant left the party around 8:00 p.m. Approximately 20 minutes later, a witness testified that he saw defendant return. Defendant approached Ramirez, took out a .22-caliber handgun, and asked Ramirez if he “was really tough.” When Ramirez responded, “yes,” defendant placed his gun on Ramirez’s forehead and fired one shot. Defendant ran back to his car and fled. Five additional witnesses testified that they saw defendant shoot Ramirez.

Detective Brad Giacobazzi testified as a gang expert.<sup>2</sup> Giacobazzi testified that he had been an officer with the Concord Police Department for 16 and a half years. At the time of trial, he had been a detective in the gang narcotic unit for nine years. After providing general background testimony on the Sureño gang, his testimony focused on

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

<sup>2</sup> Gang enhancement allegations require evidence that the defendant committed the felony “ ‘for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ [Citation.] ‘In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a “pattern of criminal gang activity” by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called “predicate offenses”) during the statutorily defined period.’ ” (*Sanchez, supra*, 63 Cal.4th at p. 698.)

the South Side Locos (SSL), a sub-set of the Sureño gang, located in Concord. He identified the typical identifying features of SSL gang members, such as tattoos, colors and hand signs, and identified the SSL gang territory, which included the location where the shooting occurred. He testified that the primary activity of the SSL involved commission of crimes including “everything from simple assaults, burglaries, stolen vehicles, all the way up to weapon possession, firearm possession, robberies, assault with deadly weapons, attempted homicides, and homicides.” Giacobazzi testified to three predicate offenses committed by the SSL. As to each offense, Giacobazzi identified the people involved as SSL members and related a brief summary of the details of the crime. His opinions that the people involved were SSL members was based in each instance on his personal knowledge and prior experience with the men as well as their tattoos and self-admission of gang membership. With at least one of the predicate offenses, Giacobazzi testified that he personally investigated the “gang portion” of the offense. Certified copies of the relevant convictions were introduced into evidence.

Based on, among other things, defendant’s tattoos and photos on his phone, Giacobazzi opined that defendant was a SSL member. A second police officer confirmed that when that officer arrested him in 2009, defendant admitted that he was a Sureño. In response to a hypothetical that resembled the Ramirez shooting, Giacobazzi stated that someone wearing rival colors and loudly proclaiming a rival affiliation on SSL territory could prompt violence from an SSL member trying to defend his gang’s territory and reputation. He explained that the crime would benefit the gang by instilling fear and intimidation in the individuals that witness the shooting and would show that the gang was willing to engage in violence to protect its turf.

The jury found defendant guilty of first degree murder and found true the firearm and gang enhancements. The trial court sentenced defendant to 60 years to life in prison. Defendant timely appealed.

## Discussion

### 1. Defendant's conviction is affirmed.

Defendant contends “The gang enhancement must be stricken and [his] murder conviction must be reversed because the trial court deprived [him] of the right to confront the witnesses against him when it permitted the gang expert to recount testimonial hearsay to the jury as part of the basis for his opinion that the crimes with which [he] was charged were gang-related.” He argues that during trial the gang expert “relied substantially on facts he had gleaned from police department documents and other police officers as the basis for his opinion on several topics related to the gang enhancement” and that the expert’s reliance this testimonial hearsay violated his right to confrontation under the Sixth Amendment.

As the Attorney General explains, “When appellant filed his opening brief on February 24, 2016, existing precedent from the California Supreme Court held that gang experts could describe for the jury otherwise-inadmissible evidence that they relied on to form their opinions because the information was not being introduced to prove the truth of the matter asserted.” (Citing *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) In *Sanchez*, however, the court overruled this authority, holding that “case-specific statements related by the prosecution expert concerning defendant’s gang membership constituted inadmissible hearsay under California law.” (*Sanchez, supra*, 63 Cal.4th at p. 670.) The court explained, “When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true.” (*Id.* at p. 684) The court emphasized that its decision “does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise” but “restores the traditional distinction between an expert’s testimony regarding background information and case-specific facts.” (*Id.* at p. 685.) In addition, if the hearsay is testimonial as defined by the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 and its

progeny, the erroneous admission violates a defendant's right to confrontation under the Sixth Amendment. Any such error is subject to the heightened standard of prejudice under *Chapman v. California* (1967) 386 U.S. 18.

Applying this rule, the court in *Sanchez* concluded that the expert's testimony regarding the defendant's prior contacts with police, about which the officer learned solely through his review of police reports, was testimonial hearsay. (*Sanchez, supra*, 63 Cal.4th at pp. 694-695.) Similarly, the expert's testimony regarding defendant's California Street Terrorism Enforcement and Prevent Act (STEP) notice, including defendant's biographical information, whom he was with, and what statements he made, included testimonial hearsay.<sup>3</sup> (*Id.* at pp. 695-696.) Finally, the court concluded that the expert's testimony regarding the contents of a field identification card may be testimonial if the card was prepared in the course of an ongoing police investigation. (*Id.* at pp. 697-698.) The court concluded that the admission of the expert's case-specific testimony regarding defendant's police contacts, which was relied on to prove defendant's intent to benefit the gang when committing the underlying crimes, was prejudicial because no other evidence supported the conclusion that the defendant's crime (possession of drugs) was intended to benefit the gang. (*Id.* at pp. 698-699.)

Here, defendant contends the prosecution relied on inadmissible testimonial hearsay to establish that the SSL was a criminal street gang within the meaning of the statute. Defendant argues, "The prosecution, 'as the proponent of evidence presumptively barred by the . . . Confrontation Clause,' had the burden of proving the statements that Detective Giacobazzi relied upon were not testimonial. (Quoting *Idaho v. Wright* (1990) 497 U.S. 805, 816.) The People did not meet that burden at trial, and on appeal cannot establish the sources of the gang expert's opinion were not testimonial. Detective Giacobazzi testified the primary activities of the SSL gang were committing 'simple

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<sup>3</sup> "A STEP notice informs suspected individuals that law enforcement believes they associate with a criminal street gang." (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1414, fn. 1.) The notice often is prepared after police contact with the suspected gang member and includes the details of the contact and the person's physical characteristics.

assaults, burglaries, stolen vehicles, all the way up to weapon possession, firearm possession, robberies, assault with deadly weapons, attempted homicides, and homicides.’ The prosecution never asked Detective Giacobazzi for the basis of this opinion, and thus failed to establish it was not based on testimonial hearsay. Furthermore, Detective Giacobazzi’s testimony about the basis of his knowledge about the SSL gang shows his sources of information were almost certainly testimonial hearsay. He said he learned about the SSL gang by talking to people ‘who you’ve actually arrested and are investigating for crimes.’ He also gleaned information by talking with other police officers. Information about gang crimes learned from other police officers would be double hearsay, and the likely underlying source would be police reports. Detective Giacobazzi also reviewed police reports written by police officers from Concord and other police agencies. All these sources of information are testimonial and, to the extent the source of information is unclear, this shortcoming must be held against the prosecutor, who had the burden of proving the evidence was not testimonial.”

Defendant also argues that Giacobazzi “relied on testimonial hearsay when he testified about the predicate crimes introduced to prove the gang enhancement. While there were non-testimonial court records that proved certain individuals were convicted of specified crimes, Detective Giacobazzi testified about the specific details of those crimes, details he could not have learned from the conviction records. He described the specific circumstances of each crime, the carjacking of a taxi in Walnut Creek, a 2010 robbery of an individual wearing a red hat outside a 7-11 store in Concord, and a 2012 home invasion robbery in Concord where the defendant told the arresting officers he was a validated Sureño. The only possible source of this information was police reports in those cases. Therefore, the prosecution failed to meet its burden of proving those details were not based on testimonial hearsay.”

Defendant concludes, “Thus, the record in this case demonstrates the gang expert relied on extensive testimonial hearsay in support of his opinions [he] was a member of the SSL gang and committed the crime to benefit the gang.” We disagree.

Giacobazzi clearly has sufficient experience to testify to the relevant background information regarding the existence of the gang, its turf and its culture. His opinion that certain individuals were SSL gang members was based on his personal knowledge and experience gained over his nine years working in the gang division of the Concord police department. For example, Giacobazzi testified that his opinion that one individual was a gang member was based on his “personal knowledge of [the man], prior contacts I’ve had with [the man], self-admissions of [the man.]” With respect to another individual, Giacobazzi testified that his opinion was based on “knowing [the man] very well . . . . I’ve had dozens of contacts and arrests with [him].” Although it is possible that his opinions also reflected his review of police reports or other hearsay statements, his unchallenged testimony is that his opinions were based on his personal experiences with the identified individuals. This personal knowledge coupled with the certificates of conviction amply supported his opinion that the primary activity of the SSL was criminal activity. The same analysis applies to Giacobazzi’s testimony regarding the three predicate offenses. In addition, he testified that he participated in the investigation of one of the offenses. Even assuming that some of his testimony regarding the details of the predicate offenses was based on his review of police reports, the nonhearsay evidence is more than sufficient to establish a pattern of criminal activity, so that any error in the admission of the details of those offenses was harmless beyond a reasonable doubt. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458 [certified minute order coupled with expert’s testimony that defendant named in minute order was known gang member was sufficient to establish predicate offense].)

Giacobazzi opined that defendant was a SSL gang member based on defendant’s tattoos and photos of defendant with men whom Giacobazzi knew, based on his personal knowledge, were also SSL gang members. In addition, a second officer testified that defendant self-identified as an SSL gang member when that officer previously arrested defendant. This evidence amply establishes that defendant was a member of the SSL criminal street gang within the meaning of the statute.

Giacobazzi's opinion that the crime was committed for the benefit of the gang was based on a hypothetical involving predicate facts properly established by percipient witnesses. (See *Sanchez, supra*, 63 Cal.4th at p. 684 [“[E]vidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question.”].) Thus, although subsequent to defendant's trial our Supreme Court tightened the requirements for the admission of gang-related expert testimony, the expert testimony in this case fell within the new standard. There was no prejudicial error in the admission of the gang expert's testimony.

2. *Defendant's sentence is modified to 50 years to life.*

Defendant contends, and the Attorney General agrees, that the 10-year gang sentence enhancement imposed by the court should be stricken because the enhancement does not apply to violent felons sentenced to indeterminate life terms. As the Attorney General states, “On nearly identical facts in *People v. Lopez* (2005) 34 Cal.4th 1002, 1011, the California Supreme Court reduced a sentence for first degree murder with firearm and gang enhancements from 60 years to life to 50 years to life. The court held that the 15-year minimum parole eligibility requirement in section 186.22, subdivision (b)(5), supersedes the 10-year consecutive term in section 186.22, subdivision (b)(1)(C), if a defendant is sentenced to a determinate or indeterminate life term for a violent felony. (*Id.* at p. 1007.)” Accordingly, defendant's sentence must be modified to delete the 10-year gang enhancement imposed under section 186.22(b)(1)(C).

**Disposition**

The 10-year sentence enhancement imposed under section 186.22, subdivision (b)(1)(C) is stricken and defendant's prison sentence modified to 50 years to life. In all other respects, the judgment is affirmed.



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Pollak, J.

We concur:

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McGuinness, P. J.

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Siggins, J.

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